IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 282.

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

PAUL C. GRASSE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE JUDGMENT AND OPINION BELOW.

March 20, 1952, was the date of both the judgment (Tr. 43) and opinion (Tr. 23) of the Illinois Supreme Court so that the dates mentioned on page 1 of the Petition are incorrect. We make no point of the timeliness of the Petition.

JURISDICTION.

The question of this Court's jurisdiction is discussed below under Point I, where our answer to the arguments set forth at pages 2 and 3 of the Petition will be found.

QUESTIONS PRESENTED.

Under the above heading on page 4 Petitioner begins using some esoteric phraseology that requires comment. Petitioner's studied use of the expressions "First Party Employer" and "Third Party Employer", as well as capitalizing the word "Employee" each time it is used in the same sentence with those expressions (Petition, 4, 5, 13, 14, 16, 17, 20, 21, 23, 24) diverts attention from the true nature of the classifications created by the first paragraph of Section 29, which gave immunity to *all* third-party tortfeasors bound by the Act, including employees (*Thornton* v. *Herman*, 380 Ill. 341) as well as employers, if the person injured happened fortuitously to be an employee bound by the Act; whereas it denied such immunity to *all* third-party tortfeasors not bound by the Act, including employees, employers and persons who were neither employers nor employees, such as farmers, lawyers, housewives. The expressions "Third Party Employer" and "First Party Employer" are unknown in Illinois law, were not used by either party in the briefs or arguments filed in the courts below, and first made their appearance in Petitioner's Petition for Rehearing filed in the Illinois Court. They were evidently contrived by Petitioner in an effort to give some color of verbal plausibility to Petitioner's theories, in the expectation that persons reading them would be impressed by Capital Letters and would overlook the fact that they do not make Sense.

SUMMARY STATEMENT.

Accuracy in the summary statement is one of the prime requisites of a petition for writ of certiorari, yet at pages 8 and 9 of the Petition we find repeated three times in various forms ("In Count II of the complaint plaintiffs rely on the first paragraph of Section 29" etc. "This additional defense and Count II of the complaint are similar in legal import. Both rely on the first paragraph of Section 29". "The plaintiff moved to strike * * * on the ground that the first paragraph of Section 29, the basis of Count II of his complaint, was unconstitutional" etc.) the statement that in Count II the plaintiffs rely on the first paragraph of Section 29, a statement that is not true and is not substantiated in the record. This statement puts Respondent's counsel and the co-plaintiff, Swift & Company, in the invidious and rather stupid position of denying the validity of a statutory provision and at the same time relying on it. In Count II we referred only generally to the "provisions of Section 29" (Tr. 5) and we neither mentioned nor relied upon the provisions of the first paragraph of that section; we relied on the provisions of other paragraphs of Section 29 as suggesting a basis for the claim of Swift & Company alleged in Count II, and this fact is well known to Petitioner, since in the Appellant's Brief filed in the Illinois Court we said, at page 46, that the second and succeeding paragraphs of the section "should be held valid and construed to apply to the claims of injured employees against all third-party tortfeasors, regardless of whether they are bound or not bound by the Act", and it cannot be denied that if Grasse's claim were governed by the second paragraph of the section Swift & Company would be entitled to prosecute its claim alleged in Count II. Count II is

not involved in the present proceeding before this Court, and Petitioner was not required to mention it. Petitioner's gratuitous references to it three times in a relatively short summary statement, as well as the repeated misrepresentation prejudicial to the Respondent, are factors that the Court should take into consideration in judging the merits of the Petition.

The contents of Count I are not accurately stated in the first paragraph of the Summary Statement (Petition, 8). In that count (Tr. 1-3) it is not alleged that Grasse was driving a truck in the course of his employment by Swift & Company. Petitioner's record references are to Count II (Tr. 3-6).

Both plaintiffs, Grasse and Swift & Company, joined in the motion challenging the validity of the first paragraph of Section 29 (Tr. 9).

The judgment of the Supreme Court of Illinois was that the Circuit Court erred in denying plaintiff Grasse's motion to strike that portion of defendant's answer predicated on the constitutionality of the first paragraph of Section 29, and in dismissing plaintiff's claim as alleged in Count I of the complaint; the judgment of the Circuit Court was reversed and the cause remanded with directions to reinstate Count I of the complaint (Tr. 42, 43).

REASONS FOR DISMISSING OR DENYING THE PETITION.

I.

The petition for writ of certiorari should be dismissed or denied for want of jurisdiction. This Court is without jurisdiction to review the decision of the Supreme Court of Illinois for the following reasons:

A.

The Illinois Court's decision is based on independent non-federal grounds adequate to support it, regardless of any federal question. The Illinois Court held that the provision of the statute was invalid as in conflict with several articles of the Illinois Constitution.

The Supreme Court of Illinois (to which, for the sake of brevity, but with due respect, we refer as the Illinois Court) said in its opinion:

> "On the basis of the foregoing analysis it is apparent that the arbitrary classifications created by the first paragraph of Section 29 of the act do not constitute a valid exercise of the police power, and violate the guaranties of due process of law and equal protection of the laws under the Federal and State constitutions, as well as section 22 of article IV of the Illinois Constitution, forbidding special laws granting special privileges and immunities, and the policy of the State constitution set forth in section 19 of article II, providing that every person ought to find a certain remedy in the law for all injuries and wrongs which may be received to an individual's person, property or reputation." (Tr. 39, 40; 412 Ill. at p. 200.)

And in reference to the federal and state constitutional

rules against arbitrary classification the Court earlier in the opinion said:

> "Although these constitutional guaranties overlap, so that a violation of one may involve the violation of the other, the spheres of protection they offer are not coterminous, for the guaranty of equal protection of the laws extends beyond the requirements of due process. (*Truax* v. *Corrigan*, 257 U. S. 312.) Moreover, section 22 of article IV of the Illinois constitution supplements the equal protection provision of the fourteenth amendment of the federal constitution, by prohibiting the passage of a special law granting to any corporation or association or individual any special or exclusive privilege, immunity or franchise. *Michigan Millers Mutual Fire Ins. Co.* v. *McDonough*, 358 Ill. 575." (Tr. 34; 412 Ill. at p. 194.)

Thus the Illinois Court held the statutory provision in question invalid on the independent, non-federal ground of conflict with the state constitution, and this holding is clearly and unambiguously expressed in the opinion. The provisions of the Illinois constitution, which the plaintiffs relied upon and which the Illinois Court held were violated, were the following:

> Article II, Sec. 2: "*No person shall be deprived of life, liberty or property without due process of law.*" (Illinois Revised Statutes, 1951, Vol. 1, page 9.)

This due process clause of the state constitution has often been construed and applied by the Illinois Court independently of the Fourteenth Amendment to the U. S. constitution. In *Off & Co.* v. *Morehead*, 235 Ill. 40, a statute was held invalid upon the sole ground of conflict with this clause, which the Court construed as follows (235 Ill. at p. 44):

> "'Due process of law' is synonymous with 'law of the land,' and it means a general public law, binding upon all members of the community under all cir-

cumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Millet* v. *People*, 117 Ill. 294; *Frorer* v. *People*, 141 Ill. 171.

"The legislature undoubtedly has the constitutional power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, but in such instances the class of persons upon whom the law is to operate must possess some common disability, attribute or qualification, or must occupy some condition marking them as proper objects for the operation of special or class legislation. *Gillespie* v. *People*, 188 Ill. 176; *Harding* v. *People*, 160 id. 459; *Ruhstrat* v. *People*, 185 id. 133; *Starne* v. *People*, 222 id. 189.

"The general principles running through all the cases is, that a statute which arbitrarily selects a class of individuals and subjects them to peculiar rules or imposes upon them special obligations or burdens from which other persons are exempt is unconstitutional."

The second Illinois constitutional provision upon which the decision in the present case was based is

Article IV, Sec. 22: "*The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—*

"*Granting divorces;*

* * * * *

"*Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatsoever.*

"*In all other cases where a general law can be made applicable, no special law shall be enacted.*" (Illinois Revised Statutes, 1951, Vol. 1, page 12.)

Conflict with this provision of the Illinois constitution was the sole ground for holding a statute invalid in *Jones* v. *Chicago, R. I. & P. R. Co.*, 231 Ill. 302, where the Court said (231 Ill. at p. 306):

> "By that provision of our constitution a guaranty is given that all valid enactments of the legislature shall be uniform in their operation upon persons and property, and by it all citizens are assured the equal protection of the laws of the state."

The third Illinois constitutional provision upon which the Illinois Court based the present decision is

> Article II, Sec. 19: *"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay."* (Illinois Revised Statutes, 1951, Vol. 1, page 9.)

This provision of the Illinois constitution was the basis for the decision in *Heck* v. *Schupp*, 394 Ill. 296, where the Court held invalid a statute purporting to abolish the right of action for damages for criminal conversation.

These Illinois constitutional guaranties are therefore a living and substantial part of the state law, which the Illinois Court is obliged to respect and enforce. In construing these provisions of the Illinois constitution and determining whether a statute violates one or all of them, the Illinois Court must decide the questions of whether a classification is created by the statute, whether the classification is reasonable or arbitrary, and whether the statute is a reasonable and valid exercise of the police power. This the Illinois Court has done in the present case and has found the statutory provision in question invalid as in conflict with all three provisions of the Illinois constitution. The fact that the Illinois Court in its opinion incidentally found that the statute was in conflict with the Fourteenth Amendment, whether that finding be correct or erroneous, does not affect the integrity of the Illinois

Court's decision, or make it reviewable, since the non-federal grounds set forth in the opinion are independent, adequate, sufficiently broad to maintain the judgment, and plainly tenable. The decision is therefore not subject to review by this Court; *Lynch* v. *New York*, 293 U. S. 52; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, 1950 revision by Wolfson and Kurland, sec. 98, page 178.

B.

No final judgment has been entered in the Illinois Court, whose decision remanded the cause to the Circuit Court for trial. Under the provisions of U. S. Code, Tit. 28, Sec. 1257 (3), invoked by Petitioner as giving this Court jurisdiction, this Court has jurisdiction to review only final judgments of state courts.

The Illinois Court's decision is strictly interlocutory, since it reversed the judgment of the Circuit Court and remanded the cause to the Circuit Court with directions to reinstate Count I of the complaint. (Tr. 42, 43; 312 Ill. at p. 203.) No property has been taken from the defendant by the Illinois Court's decision; it merely means that there will be a trial in the Circuit Court on the issues raised by the allegations of the complaint and valid parts of the answer, and if there is substantial merit to the defense set forth in the unstricken allegations of the answer it is possible that the trial may result in a judgment in favor of defendant. Nor can it be said with certainty that the trial of the cause will not give rise to further federal questions. As of the present, only the abstract legal question of the constitutionality of the first paragraph of Section 29 has been decided, and no right of the Petitioner has been adjudicated.

In specifying that this Court shall have jurisdiction to

review *final* judgments of state courts section 1257 of 28 U. S. C. is the same as previous statutes governing the Court's jurisdiction to review state court judgments, and this provision of the law has always been construed to give the Court jurisdiction to review only final and complete judgments of state courts. In *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, 546, the Court said:

> "Under sec. 237 of the Judicial Code, 28 U. S. C. sec. 344, only 'final judgments' of state courts may be appealed to this court. And it frequently has been said that for a judgment to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' *Department of Banking* v. *Pink*, 317 U. S. 264, 267. Thus, where the effect of the state court's decision is to grant a new trial, the judgment will not be final."

In *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68, the Court said:

> "Thus the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. *Bruce* v. *Tobin*, 245 U. S. 18; *Martinez* v. *International Banking Corp.*, 220 U. S. 214, 223; *Mississippi Central R. Co.* v. *Smith*, 295 U. S. 718."

In *McComb* v. *Commissioners of Knox County*, 91 U. S. 1, in which the state appellate court decided the controlling federal question and remanded the cause to the trial court for a trial on the question of damages, this Court held there was no final judgment reviewable by this Court.

In the *Radio Station WOW* case, 326 U. S. 120, and the other cases cited at page 2 of the Petition, the state court

judgments held final and reviewable had the effect of immediately transferring some property from one of the litigants or of finally adjudicating a litigant's right to a lien or execution on property. No such result flows from the Illinois Court's judgment in the present case, where the paramount issues of liability and damages remain unsettled.

In the *Department of Banking* case, 317 U. S. 264, cited on page 3 of the Petition, no dispute existed as to whether a final judgment had been entered in the state court; this Court had to determine whether the petition for certiorari was timely, and that depended on which of two orders, entered in different courts on different dates, was the final judgment; the first order was held to be the final judgment because "the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur." (317 U. S. p. 268.) The record in the present case is obviously different, since the case was remanded to the trial court not for a ministerial act but for a trial on the issues of liability and damages.

None of the cases cited at pages 2 and 3 of the Petition holds that an interlocutory decision on a constitutional question, when all of the other issues in the case including the questions of liability and damages remain unsettled, is a severable matter so as to constitute a final judgment within the meaning of 28 U. S. C. 1257.

In the last paragraph on page 3 of the Petition it is said that Count I or Count II of the complaint must be stricken, depending on whether or not the Illinois Court's decision is left undisturbed; that legal proposition is unsound and unimportant, but it forms the basis for Petitioner's next statement: "It is the rule in this Court that a judgment of a Court of Appeals may be reviewed on certiorari where it is 'fundamental to the further conduct of the case,' "

and for the citation of *United States* v. *General Motors Corp.*, 323 U. S. 373, and other cases in which this Court reviewed interlocutory judgments of United States Courts of Appeal. Of course in those cases this Court was exercising discretionary jurisdiction given under an entirely different section of the statute, 28 U. S. C. sec. 1254, which does not require a judgment to be final to be reviewable, and which applies only to judgments of United States courts and not to the judgments of state courts. The rule obviously has no application in this case, where the Court's jurisdiction is defined and limited in 28 U. S. C. sec. 1257, and has never been invoked by the Court to review a state court's judgment.

C.

The Petition presents no substantial federal question.

This hydra-headed paragraph of the Illinois Workmen's Compensation Act, unfair to both employers and employees, which the Illinois Court has by a unanimous decision held invalid, has been a source of perplexing and troublesome litigation in the Illinois courts ever since its enactment; numerous decisions construing it only made its peculiarly oppressive and unreasonable classifications the more apparent.

Nowhere in the Petition is there any statement or argument against the Illinois Court's fundamental conclusion that the classifications of injured employees, employers and third-party tortfeasors created by the statute were unreasonable and arbitrary. It is patently impossible to conceive of such an argument. Petitioner's criticisms of the Illinois Court's opinion are so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous, and the Petition should be denied or dismissed on that ground. *Wabash R. Co.* v. *Flannigan*, 192 U. S. 29.

II.

REASONS FOR DENYING THE WRIT

1. The decision is not in conflict with any decision of this Court.

The question of whether the first paragraph of Section 29 regulated an employment relationship is one of construction of the statutory provision, and the Illinois Court construed it to be a regulation not of an employment relationship but of the subject of claims of injured employees against tortfeasors, there being no relationship whatever, employment or otherwise, between the injured employees and the tortfeasors. This construction of the statutory provision is binding on this Court, since the state court construction of a state statute is accepted as final. *J. Bacon & Sons* v. *Martin*, 305 U. S. 380; *Prince* v. *Massachusetts*, 321 U. S. 158, 163.

Invoking the Tenth Amendment (Petition, 12) does not make it a federal question. The right to exercise the police power is undoubtedly vested exclusively in the states, but it is not a federal right nor is its existence guaranteed to the *legislatures* of the states or to the Petitioner by the Tenth Amendment, which says: "The powers not delegated * * * are reserved to the *States* respectively, or to the people." The legislature is not the state and the Petitioner is not the people. The rendition of the judgment herein by the Illinois Court was an exercise by the state, through its judicial department, of the state power to construe its own constitution and statutes. The Tenth Amendment forbids this Court, as an arm of the federal government, to control the state in the exercise of that power unless its exercise runs counter to some other provision of the federal constitution.

Petitioner's argument under sub-point B, (pages 13, 14) involves an over-simplification of the disputed paragraph, which regulates the claims of injured employees not merely against "Third Party Employers" but against all third party tortfeasors, some of whom are arbitrarily given immunity. The opinion (Tr. 28, 29) correctly construes Section 29.

The *Meese case* (239 U. S. 614) is of no significance in connection with the present case and the Illinois Court's decision does not conflict with it. Although Petitioner's counsel say (Petition, 16) they cited it *repeatedly* to the Court below, the only time we know of its being cited to the Illinois Court was in the Petition for Rehearing filed subsequent to the judgment below; it was not mentioned in the 70-page Appellee's Brief filed by Petitioner below.

In the *Meese case*, which originated in a federal District Court, the principal question in dispute was the construction of a provision of the Washington compensation act; plaintiffs contended that the statute as well as the opinion in the *Peet case* (76 Wash. 437) should be construed as not applying to their claim; when the case reached this Court plaintiffs also made some argument invoking the equal protection clause, of which the details are not mentioned in the opinion, and which the Court considered merely a "suggestion" (239 U. S. p. 620). Practically all of the opinion is devoted to discussing the construction question; the Court held that the federal courts were bound to follow the law as construed by the state court in the *Peet case*, and plaintiffs' contentions in that regard were rejected. In concluding the opinion the Court disposed of the constitutional suggestion in one sentence, saying that plaintiffs' suggestion as to conflict with the equal protection clause was without merit, and that plaintiffs raised no other federal constitutional question (239 U. S. p. 620).

Thus the Court in the *Meese case* did not decide any constitutional question but decided that the plaintiffs' suggestion was without merit. The Court does not settle substantial constitutional questions on the basis of mere suggestions; such questions must be seriously brought forward, with particular specification of the respects in which a party's constitutional rights are infringed, and with reasonable argument to support his contentions, elements that the Court evidently considered lacking in the *Meese case*. Therefore any inference that the Court decided a constitutional question in that case must be regarded as *obiter dictum*. Furthermore, the case is distinguished from the present case in that the Washington statute was substantially different from the Illinois statute in respect to classifying employees and their claims against third-party tortfeasors; and in this case the plaintiffs raised and the Illinois Court decided questions not only under the equal protection clause of the federal constitution, but also under several other clauses of the federal and state constitutions (Tr. 9-14, 39, 40). It is apparent that the Petitioner made no mistake in deciding to omit citing the *Meese case* in its Appellee's Brief in the Illinois Court.

The *Peet case* (76 Wash. 437), quoted at length at pages 15 and 16 of the Petition, merely construed the Washington statute, and no constitutional question, state or federal, was decided therein.

2. That the Illinois Court's decision may conflict with the decisions of courts of other states does not present a federal question and is irrelevant.

The Respondent has not and does not contend that a statute giving an injured employee an election of remedies would be unconstitutional, so that the cases cited at page 17 of the Petition are irrelevant. The Illinois statute was compulsory and gave Respondent no election of remedies.

There is no need of our commenting at length on the cases from other states cited at pages 18 and 19 of the Petition; many of them involved questions of construction rather than constitutionality, and they did not involve the peculiar provisions of the Illinois statute. The Illinois Court was at liberty to disregard them, especially since Petitioner did not cite them in the court below.

3. The Illinois Court rightly decided that the statute set up unreasonable and arbitrary classifications of injured employees, employers and tortfeasors.

In its third point (Petition, 19) Petitioner charges that the Illinois Court's judgment is so patently untenable as to be fanciful. Such language coming from a poor prisoner in the Joliet penitentiary endeavoring to gain his freedom by writ of habeas corpus might be tolerated and excused; but coming from eminent counsel who are concerned about how the Illinois Court's judgment may affect insurance companies (Petition, 24) it can be regarded only as unseemly. The statute does set up arbitrary classifications which are clearly demonstrated in the Illinois Court's opinion.

At page 20 Petitioner ventures to misquote the Illinois Court, saying that the Illinois Court referred to a "Third Party Employer." Such an expression was not used by the Illinois Court in its opinion. And in indulging itself in this misquotation Petitioner injects a bit of sarcasm about the *Truax case* (257 U. S. 312) saying that "after relying on" that case, the Court below said that the statute set up arbitrary classifications etc. The record references are to R. 32, where the *Truax case* was mentioned, and R. 35, 36, where the Court said arbitrary classifications were created. It is apparent that what the Illinois Court said about arbitrary classification at Tr. 35, 36 was based upon the Illinois cases cited at Tr. 35-38 and not upon the *Truax case*, which

was cited at Tr. 32 as an illustration of the substantial difference between exercising the police power to regulate the employment relation of master and servant and exercising it to regulate the subject of claims of employees against tortfeasors with whom the employees have no relationship whatever.

At page 20 of the Petition the Petitioner charges that its contentions were misstated by the Illinois Court, which is not true. But since there is nothing in the transcript of record to which either Petitioner or Respondent can refer to show what petitioner's contentions were below, there is no way to settle the question and it must be disregarded.

4. The question of who can assail the constitutionality of a state statute is a question of state law, and is not a federal question.

In the present case the statute has been successfully assailed by Grasse, and it must be assumed that the state law permitted it. The question of whether he was entitled to assail it in the Illinois Courts is obviously a question depending on the state law, in which this Court is not interested. No such objection was raised in the court below by Petitioner in its Appellee's Brief.

5. Whether the void first paragraph of Section 29 is separable from the other provisions of the Illinois Workmen's Compensation Act, so that the latter provisions can stand as valid, does not present a federal question, and is not in dispute.

Petitioner does not contend that the other provisions of the Illinois Workmen's Compensation Act are invalid, nor does Respondent, so that there is no dispute. In any event, the decision by a state court that a void provision of a state statute is separable from its valid provisions does not

present a federal question; *King* v. *West Virginia*, 216 U. S. 92, 101; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466.

6. The subject matter of the statute has not been left in chaos or confusion.

In Illinois today tortfeasors are paying damages to everyone they injure, the same as in the other states of the Union, and they are not given immunity if the person injured fortuitously happens to be a working man, as formerly. There is no chaos or confusion. The Illinois Court made no pronouncement as to the rights of those electively bound by the Act, and rightly so, since the rights of such persons were not involved in the present case. This has not made the administration of the Act difficult, and in fact has created no difficulty whatever in its administration. In any event, the persons bound by the act electively probably do not exceed 2% of the total number bound by the act.

7. There is no reason involving practical importance for granting the writ.

The fact that 1,000 to 5,000 lawsuits may be filed within the next year against tortfeasors who formerly enjoyed immunity is of course no reason for allowing the writ. This arbitrarily selected class of tortfeasors now have safely in their pockets (Petition, 22) the money they should have paid out as damages to injured workingmen during the past 35 years. The Respondent Grasse does not have any cash benefits in his pockets, as Petitioner ventures to suggest (Petition, 22). Swift & Company did not put $8,070.65 in Grasse's pocket (Tr. 5) by paying hospital expenses, nurses' and doctors' fees to keep Grasse alive; nor was Grasse the gainer in receiving $19.50 per week during the 54 weeks of his total disability (Tr. 5), which was con-

siderably less than he would have earned in the absence of Petitioner's tort.

Allowance of the writ would only tend to delay the settlement of pending claims, and the administration of justice would not be served thereby. We therefore urge that the writ be denied.

Respectfully submitted,

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